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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THOMAS H. LUTGE,

Plaintiff and Appellant,

v.

BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS, AND GEOLOGISTS,

Defendant and Respondent.

C075779

(Super. Ct. No. 34-2012-
80001329-CU-WM-GDS)

After an administrative hearing, the Board for Professional Engineers, Land Surveyors, and Geologists (the Board) took disciplinary action against Thomas H. Lutge, a civil and structural engineer. Lutge filed a petition for administrative mandamus to challenge the Board's action, but the petition was filed late because Lutge's lawyer mistakenly believed it was due in 120 days rather than 30 days. The trial court sustained the Board's demurrer without leave to amend and entered judgment for the Board.

Lutge now contends (1) the 30-day limitation period of Government Code section 11523¹ is unconstitutionally short, and (2) his constitutional contention raises factual issues that could not be decided on demurrer. Finding no merit in defendant's contentions, we will affirm the judgment.

BACKGROUND

After a nine-day administrative hearing, an administrative law judge (ALJ) recommended that Lutge's license be revoked but that the revocation be stayed for five years subject to enumerated terms and conditions. On March 8, 2012, the Board adopted the ALJ's recommendation. Lutge received a copy of the order on March 14 and the order became effective April 13, 2012. Lutge requested a copy of the administrative record on April 3 but did not receive the final transcript until August 20.

On December 6, Lutge filed a verified petition for writ of mandate and amended it on January 18, 2013. The Board answered the petition, asserting among other things that it was time-barred by section 11523. The Board simultaneously filed a demurrer requesting that the petition be dismissed with prejudice as untimely. Lutge argued excusable neglect, but the trial court's tentative ruling indicated that missing a limitations deadline is not excusable neglect. At oral argument, Lutge asserted for the first time that the limitations period is unconstitutional. The trial court allowed the parties to amend their pleadings to address the constitutionality of the limitation period.

In his second amended petition, Lutge argued he has a property interest in his license protected by the constitution and that the limitations period is unconstitutionally short because the task of preparing a writ petition in such a complex case within 30 days was herculean. The Board demurred again. The trial court found no constitutional violation, sustained the demurrer without leave to amend and dismissed the petition.

¹ Undesignated statutory references are to the Government Code.

DISCUSSION

I

Lutge contends the 30-day limitation period in section 11523 is unconstitutionally short. This facial challenge to the statute is a question of law which we review de novo.

Due process allows for judicial review of an administrative agency's action against a professional license. (See *Anderson v. Department of Real Estate* (1979) 93 Cal.App.3d 696, 699.) Any such challenge to an administrative decision by petition for writ of mandate must be filed in a superior court within 30 days after the last day the administrative agency may reconsider its decision. (§ 11523.) In this case, Lutge received the Board's decision on March 14, 2012, triggering the reconsideration period. (See § 11521, subd. (a).) Because Lutge made a timely request for records and transcripts, the statute was tolled until 30 days after the record was delivered to him on August 20. (§ 11523.) Accordingly, his deadline to file the writ petition was September 19, but he did not file it until December 6.

A statute must be upheld unless its unconstitutionality is "clearly, positively and unmistakably" established. (*Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484.) We do not consider the Legislature's wisdom in enacting a statute and we resolve in its favor any doubt concerning legislative power to enact it. (*Costa v. Workers' Compensation Appeals Board* (1998) 65 Cal.App.4th 1177, 1184.) To support a claim of facial unconstitutionality, the petitioner must demonstrate provisions that " 'inevitably pose a present total and fatal conflict' " with the constitution. (*Ibid.*)

A limitation period is consistent with due process if it provides a reasonable time to act. (*Kupka v. Board of Administration* (1981) 122 Cal.App.3d 791, 797 (*Kupka*).) In arguing that the time period set forth in section 11523 is unreasonable, Lutge cites cases analyzing the reasonableness of two different deadlines. In *General Motors Corp. v. City & County of San Francisco* (1999) 69 Cal.App.4th 448, the Court of Appeal found unreasonable a 90-day deadline to request a tax refund based on proof of double taxation,

because it required taxpayers to locate documents from 17 years earlier, the date the improper tax was first imposed. (*Id.* at p. 455.) No such circumstances are present in this case and thus the *General Motors* case is inapposite. Lutge also cites *Rand v. Bossen* (1945) 27 Cal.2d 61, in which the California Supreme Court held that a six-month period for questioning the validity of a tax assessment was not unreasonable. (*Id.* at pp. 66-67.) Again, the facts of the *Rand* case are not on point. Nevertheless, Lutge cites *General Motors* and *Rand* for the proposition that if a 90-day deadline was too short in *General Motors* and a six-month deadline was reasonable in *Rand*, the 30-day deadline in this case must be unreasonable. But Lutge is comparing apples and oranges; it does not help his challenge to compare timelines that have been applied in distinguishable contexts. In any event, as the California Supreme Court explained in *Rand*, the determination of what is a reasonable time period is a legislative function that will not be overruled by a court unless there is a showing of palpable error. (*Rand*, 27 Cal.2d at p. 66.) Lutge has not shown such error in this case.

The 30-day limitation period was adopted more than 70 years ago. (§ 11523, added by Stats. 1945, ch. 867, § 1, p. 1635.) Lutge does not cite information in the record suggesting the deadline has been unduly burdensome throughout its history, nor does he provide us with an analysis of relevant policy that may have been considered by the Legislature in adopting the time frame in question.

As for case law addressing section 11523, there was no denial of due process when a writ petition was filed after the section 11523 deadline due to a misunderstanding between the petitioner and his lawyer and not due to misconduct by the governmental agency or the court. (*Kupka, supra*, 122 Cal.App.3d at pp. 797-798.) Likewise, section 11523 did not deprive a nurse of due process when she did not receive timely notice of the revocation of her license; the untimely notice was not caused by the agency. (*Hansen v. Board of Registered Nursing* (2012) 208 Cal.App.4th 664, 671-673.)

Section 11523 does not authorize an extension of the deadline based on good cause.

(*Id.* at pp. 671-672, quoting *Kupka*, 122 Cal.App.3d at p. 797.)

On this record, Lutge has not established that the limitation period in section 11523 is unreasonable.

II

Lutge also argues, without analysis or citation to authority, that his constitutional contention raises factual issues that could not be decided on demurrer. He claims a trial was necessary to determine the difficulty of preparing a writ petition in this case.

As we have explained, however, Lutge's facial challenge to the statute presents a pure question of law. The statutory deadline is squarely within the Legislature's purview absent a showing of palpable error, and Lutge has not met his burden to establish a constitutional defect.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
DUARTE, J.